90-1813 (1)

Supreme Court, U.S.
FILED
MAY 21 1991
OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CITY OF TOLEDO,
DIVISION OF INSPECTION,

Respondent,

versus

MERRILL DUTRIDGE, AND
LLOYD W. DUTRIDGE,

Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

John G. Rust
COUNSEL OF RECORD FOR
PETITIONERS
833 Security Building, Toledo
Ohio 43604
AC(419) 243-9191

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. After a Trial Court has issued, an order based on a finding of a nuisance, for a home owner to complete repairs in 30 days to their 2-story, 2-vehicle garage and to secure and file a bond for $3,700 to secure the costs of destruction, is the Home Owner after filing a Motion showing substantial progress in the repair of the building to the point that the building can be saved, and the dangers from the nuisance have been met and removed, and the Home Owners have acted in good faith, constitutionally to a Hearing for the Trial Judge to determine if presently there is a real necessity to destroy the garage in order to protect the interests of the City?

2. Secondly, does the Court and/or the City Violate the due process Constitutional rights of the Home Owner, if the Court decides to order then the destruction of the garage, but the Court fails to notify the Home Owner's Counsel after the Court had stated there would

be a meeting with the Court and Opposing Counsel, before any final Action was determined by the Court, and also, the Court fails to provide or require the City to not dewtroy the garage until after the Home Owner has had a reasonable time to remove various items of Valuable Personal Property in the garage, which the City knows are in the garage?

3. Once a City receives an Order allowing the City to destroy a Citizen's 2-story garage, obviously substantial in size, is the City under a duty, imposed by the U.S. Constitution, to give the Home Owner a reasonable length of time to remove valuable items of Personal Property, when the Home Owners ask for a delay of approximately 30 minutes, and the City has known the Home Owners were opposing, but had not known of, the Judge's Order of demolition, and the City has also known the Home Owners had numerous items of Valuable Personal Property in the garage?

4. Is the Doctrine of Res Judicata to be applied by the Courts in a case involving the

Constitutional rights of the Home Owners to save their garage, costing a substantial sum of money, from Destruction by the City, only after the Courts make a finding that this and other constitutional issues have been fully, and fairly, Tried, and found, and were essential to the Judgment of a Court having clear jurisdiction thereof?

5. And likewise, is the Doctrine of Res Judicata to be applied, when the issue is whether Home Owners are entitled to reasonable notice ahead of time that the City is going to destroy the Home Owners' garage, so that the Home Owners may remove and save from destruction by the City, who knew the garage had valuable items of personal property worth in the Thousands of Dollars to the Home Owners; and that issue had not been clearly adjudged before?

6. Are Home Owners entitled to a New Trial when the Trial Judge has given comments and evidences that the Trial Judge favors the City, by voluntarily "Bailing Out" the City's Witnesses, and the City Counsel tried to commun-

icate that the City Acted under a Court Order when in Truth the City had no such Court Order, when the Trial Judge Instructs the Jury that the Home Owners had notice of impending destruction of their garage because their Counsel had been served with a Copy of the Court's Order, when in fact this instruction to the Jury was known by the Trial Judge to be Untrue, and lastly, when throughout the crucial stages of a Trial the Trial Court demonstrates favoritism to the City's Witnesses, and criticizes only the Home Owners' Attorney?

TABLE OF CONTENTS

	Page Number
Questions Presented For Review	i
Table of Authorities	v
Reference to Any Official Reports of Opinion	1
Statement of Grounds Invoking Jurisdiction of This Court	2
Constitutional Provisions, Fourteenth Amendment, Section 1	4
Statement of The Case	5
Argument No. 1	19
Argument No. 2	28
Argument No. 3	35
Argument No. 4	40

CERTIFICATE OF SERVICE

3 copies of the foregoing Petition For Writ of Certiorari are served by First Class U.S. Mail to City of Toledo Law Director, Keith A. Wilkowski, One Government Center, Suite 2250, Toledo, Ohio 43624 this May 21, 1991.

John G. Rust

John G. Rust
Counsel of Record
for Appellants Dutridge

TABLE OF AUTHORITIES

	Page Number
Abraham v. City of Warren, 67 OA 492 (1940)	26.
16A Amer. Jur. 2d. Constitutional Law	33.
Goodson v. McDonough Power Equipment, 2 Ohio, St. 3rd 193 (1983)	37, 36.
In Re Branham, Appeal of, 70 Abs. 491 (Franklin County Court of Appeals, 1953)	32.
Jackson v. City of Columbus, 40 OA2d 92 (1974)	26.
Miles v. District of Columbia, 510 F2d 188 (CA, DC, 1975)	27.
Monell v. Department of Social Services, 436 U.S. 658	15.
Reed v. Rhodes, 500 F. Supp. 363 (1980)	23.
Solly v. City of Toledo, 7 Ohio St. 2d 16, 36 O.O. 2d 9	30.
Tingle v. City of Wichita, 505 P2d 717 (1973)	25.

REFERENCES TO REPORTS OF OPINIONS DELIVERED BY LOWER COURTS.

No Opinion by any Court in this Case has been published in any Official or Unofficial reports, to this Counsel's knowledge.

The filed Opinions on non-routine matters in the Courts below are:

1) By the Supreme Court of Ohio:

A. Judgment Entry dismissing Appeal, February 20, 1991, in Case 90-1309, at Appendix p. 1.

B. Judgment Entry dismissing Appeal, in Case No. 90-1373, February 20, 1991, at Appendix page 2.

2) By Court of Appeals, Lucas County, Ohio:

A. May 18, 1990 Denying the Appeal, at Appendix, Page 3;

B. June 21, 1990, Denying Motion for Reconsideration, at Appendix, Page 16;

STATEMENT OF GROUNDS VESTING JURISDICTION IN THE SUPREME COURT OF THE UNITED STATES

This Petition for Writ of Certiorari to the Supreme Court of Ohio and to the Court of Common Pleas, Lucas County, Ohio is filed on May 21, 1991 and is within the 90 days under Rule 13 of this Court from the final Judgment of the Supreme Court of Ohio entered in that Court on February 20, 1991, in the 2 cases these appealed from, where the Supreme Court of Ohio denied both discretionary review and dismissed the timely filed Appeals, and the Ohio Supreme Court then rejected Appellants Dutridge's Motion to Certify the Record, and further held that there were no substantial questions presented under the Constitution of the United States of America, nor of the State of Ohio.

The statutory provision believed to confer Jurisdiction in this Court to review the judgment by Writ of Certiorari is Title 28, Section 1257, which reads:

"§1257.State courts;appeal;certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term 'highest court of a state' includes the District of Columbia Court of Appeals.

[As amended July 29, 1970, Pub L91-358,§172(a),84 Stat 590.]"

AMENDMENT XIV

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United states and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This Petition for Writ of Certiorari stems from 3 Cases, which were consolidated in the Court of Appeals, Court of Common Pleas, and so heard and considered in separate Appeals in the Ohio Supreme Court.

Appellants claim that in the main Action, City of Toledo vs. Merrill E. Dutridge and Lloyd W. Dutridge, Court of Common Pleas, Lucas County, Ohio No. 84-1312, that Due Process of Law was denied them in regard to the City's destruction of their garage and its contents, in 2 different ways and grounds;

1. Firstly that after a Hearing on June 22, 1984, that Counsel for both parties agreed to a finding of Public Nuisance, and the Court gave Appellants Dutridge 30 days to repair the said garage. Mr. Dutridge, then 66, and Mrs. Dutridge older, were unable to secure a Contractor to complete the garage, because it was of "Stockade Block" construction, with which Contractors refused to deal. Substantial progress and removal of all pub-

blic dangers were claimed by Mr. Dutridge, who was a builder, and they moved for an Oral Hearing to prove the same, but the Trial Court, the Court of Common Pleas, refused to give them a Hearing, and ordered the garage destroyed, all where there was no real necessity nor need therefor.

2. Secondly, we claim that once the City determined it would thereupon proceed to raze and tear down the garage, that since the City knew that there were many valuable items of personal property stored in the 2 story, 2 vehicle garage, that the City there should have given a reasonable Notice of at least 3 days time so Mr. and Mrs. Dutridge could remove them before the destruction. The Building was large, over $10,000.-- had been invested in it, and there was no real need for Notice not to be given. The Garage had been, except for the repairs and improvements made by Mr. Dutridge after the Court Order of June 25, 1984, in the same condition, for several years with no injury or damage to anyone. The City acted from spite, and from political pres-

sure through the Toledo Blade newspaper, to "make a showing" on the City's Nuisance Abatement Program for abandoned homes.

The Trial Court Judge simply felt that there was no Constitutional Due Process duty to require a Hearing to show necessity and public danger still existing as opposed to Appellants' offered evidence that the conditions of public nuisance and danger had been eradicated.

This Appeal involves three (3) cases which were consolidated in the Court of Common Pleas and in the Court of Appeals. The main action below is C.P. 84-1312, in which the City sought an abatement and destruction of an alleged nuisance in the Dutridge's garage, and also in the Third Count, for recovery for the City's damages and costs in demolishing the garage, and also for its costs in a clean up ordered by the City, previously at the Dutridge's residence.

C.P. 87-0336 was a refiled action which the Dutridge's initiated to recover for an

assault on Mr. Dutridge by Police Officer Thoman on October 7, 1983, and also for damage on October 7, 1983, to some cars of the Dutridges', which without cause and/or necessity were damaged by the city in its several clean-ups, also on October 7, 1983, and later in November, 1983.

The Third C.P. action, which through the City's inadvertence, was filed in duplication, and was therefore dismissed without prejudice.

With that done, we turn to the complex procedural history of these three (3) cases.

The main action, 84-1312, was filed May 22, 1984, by the City of Toledo, Division of Building Inspection, against Mr. and Mrs. Dutridge, praying for a Temporary Restraining Order, a preliminary and permanent injunction for destruction of their garage, and damages. On June 22, 1984, a hearing was held on the Preliminary Injunction, and evidence was taken, and the Court expressed itself clearly, and upon the evidence, the Court stated it was going to grant a Preliminary Injunction. The only point in issue, in the Court's mind, was how

many days to allow the Defendant to complete the garage. The garage itself is a so-called "Stockade" construction, which is unusual, not known commonly to contractors, and more difficult and time taking to construct and to repair. The Court did not issue at that time a "flat out" self executing order for the demolition or destruction of the garage. The order was conditional. Paragraph 5 of the said Judgment Entry June 25, 1984, provided as follows:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon Defendant's failure to post the said bond, and repair the premises as indicated by this order, the Plaintiff, City of Toledo, Division of Building Inspection, is to raze the building forthwith, and the Defendant is hereby ordered to pay the costs thereof."

Mr. and Mrs. Dutridge posted the required $3,700 bond on time. Progress was made in the construction of the garage, and on July 31, 1984, Defendants moved for a short extension of time for the completion of the garage. Without holding any Hearing, to determine whether or not the Dutridges had abated the nuisance, had shown progress in the completion of the

construction of the garage, and was acting in good faith; the court denied the said Motion. A copy of that Judgment Entry was not served upon this Counsel, nor notice thereof given Dutridge's counsel, but was reported served upon the Defendants Dutridge, on August 17, 1984. After that Motion of July 31, 1984, was filed, on August 27, 1984, the Court indicated to both Counsel the Court would see Counsel to discuss questions of law, on the Dutridges' claim for a hearing for an extension, and to see if the Court wanted to act on it. On August 29, 1984, at the time stated by the court to see both Counsel, about noon, Mr. and Mrs. Dutridge, this Counsel and Attorney David L. Toska, then working in the Office of this Counsel, went to the courtroom of Judge Restivo, and presented a Motion to hold up any order of destruction of the garage, as progress was being made in the repairs of the garage, and all nuisance conditions had been abated. The City attorney not then being available, Judge Restivo said that he would schedule a meeting with the city

Counsel and this Counsel. This Counsel then had to go to Columbus for an Industrial Hearing that afternoon and stated to the Court that he would be by at 8:30 to arrange the time for meeting with the city attorney and any other matters, the Court decided. However, the Court that afternoon was apparently notified that the city Attorney would be present the next morning, but no notice was given to this Counsel nor to his office that the City Attorney would be present at 8:30 AM.

It was obvious, and moved in their Motion, that the Dutridge's would offer evidence in support of the Motion and that they wanted to be present, and without any notice nor a telephone call, as is customary if a Counsel fails to appear, that morning or otherwise to this Counsel, the Court at apparently 9:00 went ahead. There had not been any prior order sitting Dutridge's Motion for hearing or the Dutridge's and Counsel would have been there. WE claim that that was a failure to give the effective notice required by the Constitution.

About 10:00 AM on August 30, 1984, this Counsel stopped in at Judge Restivo's Court and the Judge then stated that since the City Attorneys were there at 8:30 AM, that the Court determined to issue the Order for the destruction of the Dutridge's garage. Customarily in Toledo, and we believe throughout Ohio, in time past, when one Counsel does not appear, a member of the Court's staff will telephone the other Counsel not present, and hold matters until he can come over. Such has been done in this case for the City Counsel, and probably for this Counsel. For some reason, neither Judge Restivo nor any of his staff at 8:30 AM on August 30, 1984, called this Counsel or else he would have been there. We repeat. This Counsel had stated that he would come by about 8:30 AM to see if arrangements could be set up with the city Attorney, so that we could all meet to consider questions of how and when the Court would do with our Motion filed the day before to wit; August 29, 1984, for additional time to complete the started, but not finished repair of the Dutridge's

two-story garage.

As stated above, about 10:00 AM, this Counsel went to Judge Restivo who stated that he had gone ahead and issued the order for the destruction of the garage. This Counsel then went ahead with the filing of a Complaint in the Federal court against the City of Toledo and the Division of Building Inspection which had been prepared if Judge Restivo should refuse to give relief, and arrangements were made with Federal Judge Potter, who agreed to see the City Attorney DAvis, and this Counsel in chambers at 12:30 PM. Mr. Dutridge waited in the waiting room.

Judge Potter declined to take action, stating that we should appeal to the Ohio Court of Appeals. City Attorney Geoffrey Davis, then said that he was going to go ahead. Then about 2:00 PM, that afternoon, or maybe before, the City, with Mrs. Bernadette Barth, the city's prime mover, who held much malice and spite against the Dutridge's, was there at the Dutridge's residence. The City

through Attorney Davis, and all concerned, had not given any notice, before, that they were going to come in with bulldozers, and destroy the garage, until after, the appearance before Judge Potter, and there were then no times stated; it was merely a pronouncement that the City was going to raze the garage, but no time was specified. Accordingly, Mr. and Mrs. Dutridge did not have any notice, nor opportunity to get their items of personal property still in the garage out, as the City knew, nor did they have any constitutional hearing, on whether or not, they had complied with the prior orders of Court, in good faith and in substance.

After all this time, it should be obvious to any Court that the city here chose not to give any further notice, although they could have, and there is no showing whatsoever, that at that point in time, one day's delay, or more, would have made any difference, and in truth, one day's delay would not have made any real difference, as the garage was then in better condition than it had been for several years.

On October the First, 1984 these Defendants filed their Notice of Appeal to the Court of Appeals, which was later dismissed, because there was no final order, al all the issues in the instant case, had not been determined.

Even though the Dutridge's had filed their Notice of Appeals in a timely manner, proceedings in the State Action 84-1312, were then held up until the Federal case was completed. In the Federal Court, Judge Potter ultimately ruled to dismiss the Federal Actions because the Federal Court did not have Jurisdiction, since the Dutridge's did not allege that the City, through the Building Inspection Department was implementing and carrying out an Unconstitutional Policy, and absent acts under a set policy denying Constitutional Rights, the Federal Court did not have jurisdiction under Monell v. Department of Social Services, 436 U.S. 658. Such was the only holding and determination made which was essential to the Federal Court's dismissal of the Dutridge's Federal action.

The City will probably claim that since Mr. Rust had stated to Judge Restivo that Mr. Rust would be by at 8:30 AM to attempt to set up a time with City Counsel when the Court would see Opposing Counsel and that this time Notice was given to the Dutridge's and their Counsel that the Court was free Constitutionally and otherwise, to do what the Court wanted.

When on the day before, August 29, 1984, this Counsel appeared with Mr. and Mrs. Dutridge, the Court checked with the City first, and for some reason no time was set. No writing was then made on the Trial Docket sheet to this Counselor's knowledge, that the Dutridge's Motion of August 29, 1984, was for Hearing on August 30, 1984, at 8:30 AM or at any other time, thereafter. By past experience, the Trial Judge then knew that if such had been the oral order of the Judge, that both Mr. and Mrs. Dutridge and their Counsel would have been there. But no such notice was ever given. This Counsel was to appear to

work out a date. Why did the Court not give the Dutridge's and this Counsel, a telephone call to say that the Court had changed its mind, and that the Court was going to take some action at 8:30 AM or as soon thereafter as this Counsel could get there? No such notice was ever given their counsel, nor to the Dutridge's or else both would have been there.

For matters of such importance to Mr. and Mrs. Dutridge, a common respect for their rights and for them as individuals, called for Notice first to this Counsel, as it had been given before to city Counsel, if the Court felt compelled to act so soon. Actually, there was no real need to act so preciptuosly. If there had been, then why didn't Judge Restivo so inform this Counsel, Attorney Toska, and Mr. and Mrs. Dutridge at noon the day before, when a phone call was put in by the Court's staff, and the message received by the Court staff that the City Counsel would meet later, at some yet to be determined time.

The Constitutional claims were made by Appellants Dutridge many times, including the following:

1. Motion For Hearing on Constitutional Rights, filed, August 29, 1984;
2. Defendants Supplemental Response to Plaintiffs' Motion For Summary Judgment;
3. Defendants Second Amended Answer and Counterclaim;
4. Trial Brief, filed May 17, 1988;
5. Request For Instruction To Jury;
6. Dutridges' Third Affidavits; and also Affidavits of May 27, 1987; January 25, 1988.
7. Motion For New Trial.

The Courts have been made well aware of our Constitutional claims, and the Courts have refused them.

ARGUMENT I

AFTER A TRIAL COURT MAKES AN AGREED FINDING THAT AN UNFINISHED RESIDENTIAL GARAGE, WHICH COST THE HOMEOWNER SOME $10,000.-, CONSTITUTES A PUBLIC NUISANCE, AND ORDERS IT REPAIRED WITHIN 30 DAYS, ON THE FILING OF A MOTION FOR ADDITIONAL TIME FOR COMPLETION OF THE REPAIRS, SUPPORTED BY AN OFFER TO TESTIFY THAT A PUBLIC NUISANCE AND ANY PUBLIC DANGERS NO LONGER EXIST, THE TRIAL COURT, AND CITY, PRESSING THE CLAIMED DESTRUCTION OF THE HOMEOWNER'S GARAGE, ARE EACH UNDER A DUE PROCESS DUTY FROM THE FOURTEENTH AMENDMENT TO HOLD A HEARING TO DETERMINE IF THE GARAGE CAN BE SAVED, AS REAL NECESSITY IS THE CITY'S ONLY JUSTIFICATION FOR DESTRUCTION; AND THE HOMEOWNER IS ENTITLED, IF THE GARAGE CAN BE REASONABLY SAVED, TO ADDITIONAL TIME TO EFFECT THE REPAIRS, EVEN THOUGH THE UNUSUAL CONSTRUCTION OF THE GARAGE REQUIRES MORE TIME FOR THE NEEDED REPAIR.

This basic constitutional claim was made at the Trial Court level before the garage was destroyed on August 30, 1984, and there was rejected, as it was in the Court of Appeals, and in the Supreme Court of Ohio.

No controlling decision of this Supreme Court of the United States, dealing with such a factual and legal issue, has been cited by any Counsel nor by any Court.

This claim of a Constitutional right to a Hearing where repairs have been made in part, and obviously, Mr. Dutridge then 67 and with some physical disabilities, and Mrs. Dutridge older, were acting in good faith, and had made substantial progress, we claim, were entitled to a hearing before the valuable garage was destroyed. Appellants Dutridge stood ready to show that all conditions which the City constituted a nuisance had been corrected, so that no longer was there any public danger or nuisance.

The realities of the situation were that the Toledo Blade and others were putting political pressure on City Council to stop delays in the City's Nuisance Abatement Program dealinw primarily with abandoned homes. Thus there was political pressure to "make a showing".

On August 29, 1984, the day before the garage was destroyed on August 30, 1984, Appellants Dutridge filed a "Motion For Oral Hearing on Determination of Constitutional Rights; And Other Relief", asking for protection of their

rights from the City's plans to destroy their 2 story, 2 vehicle, "Stockade Block" garage, stating in support:

"1. Mr. and Mrs. Dutridge have tried in good faith to comply with the prior order of this Court, of June 25, 1984, and have been handicapped and disadvantaged in so doing by reason of their age, their health, inability at times to get materials readily, a greater inability to get people to work with them, and an inability to find any contractor, who was ready and capable of taking over the job of completing the repair of the garage in question; and

2. The garage in question, as was testified before the Court is made generally of a "Stockade Block", and this form of construction is not understood, nor can the work of the repair on it, be undertaken by many contractors; and addordingly, Defendants, although they have tried, have not been able to find a contractor to do the work; and

3. Substantial progress has been made, and if allowed, Defendants will quickly complete the repair of the said garage, and thereby, the value of their property will be increased by over Ten Thousand Dollars ($10,000.00), which is the amount of money they have into the said garage; and

4. The law recognizes the importance of conserving and saving property, rather than destroying it, and defendants ask for this opportunity to add to, and not take away, from the value of their property, and the taxable property of Toledo; and

5. Defendants are acting in good faith, and will shortly complete the repair of the garage in question; and their garage, is not now, constituting any real danger to Toledo, and defendants have acted in compliance as far as they could with the order of this Court."

For Law, we cited in the first paragraph of the Memorandum in Support of Motion, the following:

"In 10 A.AM JUR. 2d Constitutional Law Par 587, at Page 514 reads in part: 'But public necessity is the limit of the right to destroy property which is a menace to public safety or health and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way.'

Defendants have tried to comply. Submit that, in effect, that Defendants are in a position similar to a person who is charged with Contempt of Court. In both situations, a person is called upon to give a explanation of why, he or she has not complied with the order of the Court. Mr. and Mrs. Dutridge have tried. They are not acting in defiance of the Court. In 17 O.JUR. 3d, Contempt, Par 66, in part reads as follows, at page 397: 'A defendant is entitled to a hearing affording him an opportunity to present facts bearing on his capacity to comply with an order before he can be found guilty of contempt of such order, and denial of such right constitutes an infringement of defendant's right to due process of law under both the federal and state constitutions.'

If Defendants have been taken ill, and their illness had completely prevented them from doing any work, toward compliance with the repairs, then this Court would have recognized that, we submit, as a defense. Same principal applies here."

And on the issue of Contempt, and Due Process requirements, we cited:

"Non-compliance with a Court order is punishable in an action for contempt, but only after the alleged contemnors have been afforded a full hearing on the matter as mandated by

the due process requirements of the Constitution of the United States and the Constitution of the State of Ohio.

In Reed v. Rhodes, 500 F. Supp. 363(1980), at 400, the Court stated:

> '(8) The relevant inquiry in a civil contempt proceeding is whether the defendants took "all the reasonable attempts within their power to insure compliance with the orders." Sekaquaptewa v. MacDonald, 544 F.2d 396, 406(9th Cir. 1976). Thus, 'a finding of civil contempt may be made if it is shown that a party has violated his obligations imposed by a court decree by a failure of diligence, ineffective control, and lack of purpose in effectuating the requirements of the decree.' Jordan v. Arnold, 472 F.Supp. 265, 289 (M.D.Pa.1979). See also Palmigiano v. Garrahy, 448 F.Supp. 659 (D R.I. 1978). (9) Of course, the alleged contemnor has the right to prove mitigating circumstances such as good faith and defenses such as inability to comply or substantial complaince. Washington Metropolitan Transit Authority v. Amalgamated Transit Union, supra; Aspira v. Board of Education, supra.

We respectfully challenge the City to cite any case, where, a homeowner was given, by the prior court order, an opportunity to abate the nuisance, and then thereafter, the Court upheld the condemnation and destruction and razing of the property without any hearing."

No "Cow Cases" -- cases that stand "On all Fours" with the case at Bar have been found.

"The closest case, to this Counsel, supporting the above Proposition of Law No. 1 is Groff v. Borough of Sellersville, 314 ATL. 2d 328 (1974), where destruction of an owner's Building before the owner could appeal, from the Trial Court's Order, when the building

had not been repaired, but was repairable, was held unlawful, and the Trial Court's Order of destruction, on appeal, was reversed for the Trial Court to determine the time needed for repair, and the Appellate Court further ruled that the Borough denied the rights to the building owner, when the Borough destroyed the Building before an appeal could be taken. On June 30, 1972, an Order was entered by the Court of Common Pleas, directing demolition within ten days. The same order had been issued orally by the Chancellor on June 30, 1971 -- one year before! The Appellate Court affirmed the Trial Court's findings of nuisance, and that the building was not beyond repair. In 314 ATL. 2d at Page 331, the Court stated:

'The lower court apparently determined that, because Groff had not complied with this order, the only reasonable remedy was to order the building demolished.

6, 7) Groff argues that he did not comply with the order to repair his building becuase he wished to appeal from the finding that his building constituted a public nuisance, and that he could not appeal from the June 30, 1971, order because it did not constitute a final order. We must agree that the June 30, 1971, order did not meet the requirements of Pa. R.C.P. nos. 1516-1519 (even if the parties had agreed to that procedure), and an appeal therefrom would either have been quashed or remanded to permit the filing of exceptions. See Community Sports, Inc. v. Oakland Oaks, 429 Pa. 412, 240 A. 2d 491 (1968); Philadelphia v. Protect-A-Life Corporation, 3 Pa. Cmwlth. 469. 284 A. 2d 158 (1971). Groff's failure to repair his premises following the June 30, 1971, order, therefore does not conclusively establish that he cannot or will not do so, thus necessitating immediate removal of the building. '

8) When it is determined that a public nuisance in fact exists, the courts should not

devise a remedy harsher than the minimum necessary to properly abate such nuisance. Cf. Barclay v. Commonwealth, 25 Pa. 503 (1855); Hatboro Borough v. Ivycrest, Supra. The lower court here found that Groff's building was repairable, and it should not have subsequently ordered the building demolished without making a further determination that Groff could not or would not abate the nuisance through repairs.

We, therefore, affirm the lower court's finding that Groff's building constitutes a public nuisance, but we vacate the lower court's order and remand the record to that court for the purpose of devising a more appropriate remedy.'

The City below cited Tingle v. City of Wichita, 505 P. 2d 717 (1973) where a Resolution of the City, was issued on October 3, 1967, to diligently repair or the property would be destroyed by the City, and Tingle purchased the property on November 3, 1967, took out the two Building permits, stopped work on September 12, 1968, and thereafter the City thought Tingle ahd abandoned the property, and it was destroyed in December, 1968, and January, 1969. In 700 705 P 2d the Court stated at Page 721:

> '4,5) This court is of the opinion that once a structure has been legally condemned, the propriety of its razing and removal, or failure to diligently prosecute the same on the part of the owner, is a question of fact to be determined by the finder of fact. If in the opinion of the jury, the owner had diligently prosecuted repair or removal, the city would lack authority to raze the structure, and an action would lie for demolition of the building. However, upon review of the record, we are compelled to con-

clude the jury had ample evidence to find the appellant had abandoned repair so as to authorize the city or raze the structure by reason of the owner's failure to diligently prosecute and complete the repair.

6) That being the case, no additional notice or hearing was required.'

In Tingle, the question was one for the Jury - not Summary Judgment.

In Jackson v. City of Columbus, 40 OA2d/ 90,700 2d 92 (1974) the Franklin County Court of Appeals stated in 70 0.0. 2d at Page 94:

'Even assuming a building constitutes such a public nuisance as would justify its razing, if not corrected, the performance of some of the required rehabilitation may be sufficient to make the destruction of the property no longer reasonably necessary to effectuate the abatement of the nuisance. The first paragraph of the syllabus of Solly holds that, with respect to public nuisances, a city may enact legislation providing such nuisances when reasonably necessary to effectuate their abatement.' (Emphasis added.)'

and at Page 95:

'There are two aspects to this burden of proof. One is that the property was a public nuisance. There was sufficient evidence adduced to permit a finding that the property in the condition it existed was a public nuisance. However, in addition, it must be alleged and proved that the destruction of the property was reasonably necessary to effectuate the abatement of the nuisance. If means short of destruction would abate the nuisance, such must be employed.'

In Abraham v. City of Warren, 67 OA 492 (1940), the syllabus by the Warren County

Court of Appeals reads:

'The owner of a building, which is in the advanced state of disrepair and endangers the health and safety of the public, must be given a reasonable amount of time to meet the objections of a municipal building inspector and effect the repairs necessary to put such building in a reasonably safe condition, before a summary order of demolition of the building may be enjoined and the owner may recover damages from the municipality for any destruction of his property that has been accomplished under such summary order.'

In Miles v. District of Columbia, 510 F2d 188 (CA, DC, 1975) the Court stated at Page 192:

'1, 1) A municipality in the exercise of its police power may, without compensation, destroy a building or structure that is a menace to the public health or safety. However, that municipality must, before destroying a building, give the owner sufficient notice, a hearing and ample opportunity to demolish the building himself or to do what suffices to make it safe and healthy; such a procedure is the essence of the governmental responsibility to accord due process of law. 7 E. McQuillan, Municipal Corporation ¶24.561 (3d ed. 1968). The District of Columbia statute incorporates these procedural protections and substantive restraints, and its facial constitutional validity has been upheld. Keyes v. Madsen, 86 U.S. App. D.C. 24, 179 F 2d 40 (1940), cert. denied 339 U.S. 928, 70 S. Ct. 628, 94 L. Ed. 1349 (1950).'"

ARGUMENT NO. 2

ONCE A CITY SECURES A COURT ORDER TO RAZE A RESIDENTIAL GARAGE, IN WHICH THE CITY KNOWS THAT MANY VARIED ITEMS OF PERSONAL PROPERTY OF VALUE TO THE HOMEOWNER ARE STORED IN THE GARAGE, BOTH THE COURT AND THE CITY ARE UNDER A CONSTITUTIONAL DUE PROCESS DUTY TO GIVE THE HOMEOWNERS SUFFICIENT NOTICE TO REMOVE WITHIN A REASONABLE AND STIPULATED TIME, ALL ITEMS WHICH THE HOMEOWNERS DESIRE TO SAVE. IN DETERMINING THE AMOUNT OF TIME, THE COURT SHOULD CONSIDER THE REAL CONSEQUENCES OF PUBLIC DANGER FROM ANY DELAY. IF THE BUILDING TO BE DESTROYED HAS BEEN IN SUBSTANTIALLY THE SAME CONDITION FOR MORE THAN A YEAR, WITHOUT CAUSING ANY INJURIES OR LOSSES THEN THE HOMEOWNERS SHOULD BE GIVEN NOTICE TO CLEAN OUT THE BUILDING, AT THE LEAST, THREE DAYS BEFORE THE SPECIFIED TIME WHEN THE CITY WILL RAZE THE BUILDING.

For the rights guaranteed by the Constitution of the United States of America to be fully and properly enjoyed by each person, then the help and guidance of this most distinguished Court is necessary, on matters procedural, as well as substantive.

In C.P. 84-1312, there was a Court of Common Pleas judicial determination on June 25, 1984, that the Dutridge's garage constituted a Public

Nuisance. But the City did not thereby discharge all of its constitutional duties. This Counsel and the Dutridges in the Court of Common Pleas claimed, alleged, moved and offered evidence, in moving on August 29, 1984, for a Court Hearing to determine if by repairs made and other steps taken, the Public Nuisance had been sufficiently abated, so that the Court should not then order the destruction of the Dutridge's garage.

Despite the Dutridge's Motion, no such hearing nor judicial determination was made nor held. But even without going into those issues, and even if this Court should find that the City of Toledo was entitled to an order of destruction, which we at all times vigorously deny, still the City of Toledo was under a Constitutional due process duty to give Mr. and Mrs. Dutridge a reasonable Notice -- we claim three days at least -- that the City three days later as a specified time, was going to raze the building, and that, if the Dutridges wished to save their various items of Personal

Property, then in the garage, that the Dutridges should get all those items out of the garage within the stated three days time.

Such logically flows from the well-decided cases, by this Court, and by other Courts.

Neither this Counsel nor Opposing Counsel has found any decision by this Court directly in point. The closest ruling by the Ohio Supreme Court is Solly v. City of Toledo 7 Ohio St. 2d16, 36 O.O. 2d 9, where Toledo destroyed two houses, and the home owner sued the City of Toledo. City Council had enacted an Ordinance that each of the two residential houses constituted a Public Nuisance. There was no prior judicial finding nor ruling finding of a Public Nuisance. In 36 O.O. 2d at Page 9, Paragraphs 3 and 4 of the Syllabus read:

> "3. Nuisance Page §33.
> Nuisances O. Jur 2nd §50.
>
> Anyone who destroys or injures private property in abating what legislative or administrative officials have determined to be a public nuisance does so at his peril, where there has been

neither a previous judicial determination that such supposed nuisance is a public nuisance nor even an opportunity provided to the owner for an administrative hearing (with a judicial review thereof) on the question as to whether there is a public nuisance.

4. Nuisance Page § 33.
Nuisances O. Jur. 2nd. § 50.

In such an instance, when sued by the owner, the one destroying the property may be held liable for damages caused by its destruction unless he alleges and proves and the trier of the facts finds that what he destroyed was a public nuisance and that its destruction was reasonably necessary for abatement of that nuisance."

We repeat. No case directly in point has been found. But this refinement or clarification of the limitations on the Courts and the City in ordering destruction of the Homeowner's property is based on the well established principle that the City should be empowered to do only that which necessity requires.

In fact, the City may have been under some politican pressure, particularly from the Toledo Blade. But if so, then there was no real necessity for such summary action on August 30,

1984.

A common decency shoudl require every City to give the Homeowners notice ahead of time -- by three days at least -- that the City will come in on such and such a date and such and such a time. To bulldoze the Homeowner's garage is a humiliating experience. Yes, the power of the Government can be asesome. Necessity was exceeded by the City of Toledo. The Good and Restraining hand of this Court is needed.

Relavant here is the holding in In Re Branham, Appeal of, 70 Abs. 491 (Franklin County Court of Appeals, 1953), where the opinion on Page 492 reads:

> "It should be noted first that we recognize this statute is in derogation to the rights of private property and must be strictly construed. State, ex rel. Oil Col., v. Dauben 99 Oh St 406. The authority conferred upon the officer to tear down is not exclusive, but there is the further authority to order repairs to be made. This requires the exercise of a sound discretion and inconstruing the statute strictly it would seem that an order to destroy should issue only as a final resort:

that private property should never be destroyed when it might be lawfully preserved.

"In Maxedon v. Rendigs Commr., 9 Oh Ap 60 at P. 61. in speaking of the powers conferred by this statute, the Court appropriately stated:

"But the property must constitute a nuisance, and the peril be imminent, to warrant such summary action as its destruction.

"The exercise of such power in its nature msst be arbitrary, but it arises from necessity and must always be distinctly for the public welfare and with full recognition of the inviolateness of private property as guaranteed in the Bill of Rights (Sec. 19, Art. I of the Constitution." (Underscoring ours)

The above cases emphasize that no destruction by the City is lawful unless necessary.

As to the duty to give notice of the forthcoming destruction of the contents of the garage, we cite 16A Amer. Jur. 2d Constitutional Law, when Section 588 reads in part:

"¶ 588. Notice and hearing. Where necessary to insure the public safety, the legislature may under its police power authorize municipal authorities to summarily to destroy property without legal process or previous notice to the owner. 84 So

> far as property is dangerous to the safety or health of the community, due process of law may authorize its summary destruction. 85 But in any case in which the property may have a lawful use or in which a fair question arises as to whether the property is such as should be destroyed, notice and hearing are necessary. 86" (Our emphasis)

And as to Notice, Section 841 provides in part:

> "¶ 841. Character and sufficiency. The proceeding or hearing requisite to due process must be appropriate, 28 fair, 29 adequate, 30 and such as is practicable and reasonable in the particular case. 31"

Relevant here is the knowledge that without problem the Dutridge's garage for many years was as it was on August 30, 1984, except for improvements and further repairs by Mr. Dutridge in 1984.

Cases cited under Arguments No. 1 and 2, support the other.

ARGUMENT NO. 3

IN AN ACTION IN THE STATE COURTS WHERE THE PLAINTIFF CITY CLAIMS THAT IN AN ACTION IN THE FEDERAL COURT THAT THE INSTANT DEFENDANTS HAD THEN CLAIMED THE SAME VIOLATIONS AND DENIAL OF THE DEFNEDANTS' CONSTITUTIONAL RIGHTS AND THAT FEDERAL ACTION HAD BEEN DISMISSED WITH PREJUDICE, THE PLAINTIFF CITY IN ASSERTING RES JUDICATA AND/OR COLLATERAL ESTOPPEL, BEARS THE BURDEN OF PROOF OF PROVING AND PLEADING THAT THE SAME LEGAL ISSUE WAS ESSENTIAL TO THE FEDERAL COURT'S JUDGMENT, AND SUCH DEFENSE MUST BE HELD TO FAIL WHERE THE FEDERAL COURT DID NOT HAVE TO REACH SUCH ISSUE IN ITS JUDGMENT BUT INSTEAD RULED THAT THE FEDERAL COURT DID NOT HAVE JURISDICTION, BECAUSE THE CITY WAS NOT ALLEGED TO HAVE COMMITTED ITS VIOLATIONS IN FULFILLMENT OF A PARTICULAR CITY POLICY OR POLICIES.

As to Res Judicata, in the Federal Court we claim that the only essentialissue there decided was that the Federal Court did not have Jurisdiction, as Plaintiffs had not alleged that the Dutridge's rights were :violated as the result of the implementation of a City policy to accomplish such results" -- denying Constitutional rights, and therefore the Federal Court did not have Jurisdiction, and the Complaint was dismissed. Magistrate Carr's ruling, given in

the City's Plaintiff Ex. 20 here reads:

> "The City and the other defendants (various city officials) have filed a motion to dismiss, or, in the alternative, for summary judgment. Although the defendants assert a right to dismissal on several grounds, I find that none of them needs to be addressed, because the complaint on its face does not state a cause of action which can be maintained in this court.
>
> There are four defendants: the City's Building Inspection Department, the former City Manager, the City Law Director, and an assistant City Law Director.
>
> All are entitled to dismissal on the basis of certain well defined and clearly applicable legal principle.
>
> As to the City, the Plaintiffs have not alleged that their rights were violated as the result of the implementation of a City Policy to accomplish such result. Indeed, the complaint itself, by referring to actions taken by the City's agents, clearly simply seeks to impose vicarious liability. This cannot occur under the Supreme Court's decision in Monell v. Department of Social Services, 436 U.S. 658 (1978) (no liability upon a municipality unless actions undertaken in fulfillment of particular city policy."

Res Judicata applies only to such judicial determinations as are essential, (See Goodson v. McDonough Power Equipment, 2 Ohio, St. 3rd]93

at 201: (1983), and the essential issue of the destruction of the garage, and the further issue, of lack of reasonable notice of the forthcoming destruction of the garage's contents unless removed, were simply not reached nor Essential in the Federal Action.

The other personal Defendants either had immunity or were held no liable under vicarious liability. Magistrate Carr's Recommendations were simply ratified and affirmed by Judge Potter, who went no further than did Magistrate Carr.

In Ohio, the Burden of Proof is on the Summary Judgment Movant, here the City, and likewise as to their defense of Res Judicata. In Goodson v. McDonough Power Equipment, Inc., 2 Ohio St. 3d 193 (1983), Justics Holmes stated on Page 201:

> "Accordingly, an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined and essential to the judgment in the prior action.

> Norwood v. McDonald (1943), 142 Ohio St. 299 (27 O.O. 240); First National Bank v. Berkshire Life Insurance Co. (1946), 176 Ohio St. 395 (27 O.O. 2nd 360);" (Emphasis ours)

And also on Page 201:

> "In many cases within which a motion for Summary Judgment is presented relying upon collateral estoppel, there may well have been attendant elements inthe prior cause which could materially have altered the prior judgment, in which event the common party to the prior cause should not be deprived of his right to a trial by jury in the new cause."

And at Page 198:

> "The burden of pleading and proving the identity of issues rests on the party asserting the collateral estoppel. Hernandez v. Los Angeles (C.A. 9, 1980), 624 F. 2d 935. Also, Parkland left undisturbed the requisite of privity, i.e., that collateral estoppel can only be applied against parties who have had a prior "full and fair" opportunity to litigate their claims, C. A. Hardy v. Johns-Manville Sales Corporation. (C.A. 5, 1982, 681 F. 2nd 334, 338.)" (Emphasis ours)

Judges do not always disclose what their real motivations are. Today, in every Court there is a great pressure to dismiss a case, or as in our case, to extricate key issues so as would seem to lessen the demands on the Court

system.

Obviously, this Counsel does not know of all cases so dismissed or stripped of key rights by application of Collateral Estoppel. But Americans do need a declaration by this Court which further reinforce the true limitations of Collateral Estoppel. Otherwise, many worthy persons, whether home owners or corporations, will unjustly be stuck with some adjudication that was never anticipated to have such crucial and far reaching results.

ARGUMENT NO. 4

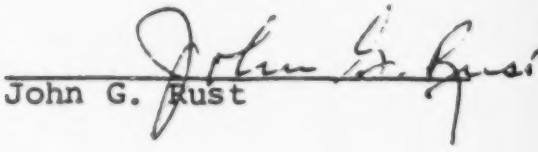
THE TRIAL COURT EFFECTIVELY DENIED MR. AND MRS. DUTRIDGE THEIR CONSTITUTIONAL RIGHTS OF DUE PROCESS BY SIMPLY "BAILING OUT" THE CITY WITNESSES DURING CROSS-EXAMINATION; BY HIS MANNER AND WORDS OTHERWISE COMMUNICATING HIS FAVORITISM FOR THE CITY; AND LASTLY IN HIS INSTRUCTIONS, STATING THE DUTRIDGE'S COUNSEL HAD RECEIVED A COPY OF JUDGE RESTIVO'S JULY 17, 1984 ORDER, AND THEN REFUSED TO CORRECT WHAT HE THEN ADMITTED WAS UNTRUE.

The Transcript of the Trial, our Assignments of Error in the Court of appeals, each bear out the above and more.

CONCLUSION

We submit that there are no direct precedents. At a time when every city has a nuisance abatement program, many home owners like Mr. and Mrs. Dutridge, need a protection by this Honorable Court.

Respectfully submitted,



John G. Rust